Office - Supreme Court, U.S.
FILED
SEP 30 1981
ALEXANDER L.

No. 80-1829

In the Supreme Court of the United States

OCTOBER TERM, 1980

T. EDWARD AUSTIN, ETC., ET AL., PETITIONERS

v.

ALICE ROBERTS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether general disclosure of the files of food stamp recipients to a state prosecutor for investigation of fraud, absent any basis to suspect fraud, is consistent with the Food Stamp Act of 1977 and the regulations of the Secretary of Agriculture.

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This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

The Food Stamp Program is a cooperative effort by the states and the federal government in which federally-issued food stamps are distributed by state agencies to needy persons. Each participating state must adopt a plan for distribution of food stamps to eligible households under uniform national standards. 7 U.S.C. (Supp. III) 2014 and 2015. The federal government provides the food stamps to the states for distribution to eligible households and contributes substantially to defray the administrative expenses of the program; the stamps are redeemable at participating retail food stores.

In February 1979, petitioner Austin, a Florida State's Attorney, began an investigation of potential food stamp fraud, in violation of Fla. Stat. Ann. § 409.325 (West 1973), by requesting the Nassau County food stamp office to provide him with the files of all food stamp recipients in the county who received monthly food stamp allotments of $125 or more (Pet. App. 6-7). After receiving the files, petitioner Austin compiled information sheets on each of the recipients. The information sheets were then distributed to local police with directions "to conduct a criminal investigation and verify, through standard criminal investigative techniques, the information collected on these forms" (*id.* at 8). The State's Attorney asked the police "to contact neighbors, employers, and others who might be familiar with the household's circumstances to verify the information previously provided to the Food Stamp Program" (*ibid.*). Approximately 500 households were investigated during a six-month period (*id.* at 9). A similar investigation was carried out in Clay County (*ibid.*).

Respondents, food stamp recipients in Florida, filed this class action in the United States District Court for the Middle District of Florida, seeking declaratory and injunctive relief against petitioner Austin, other state prosecutors, and officials of the state agency responsible for administering the food stamp plan in Florida. Respondents charged that the state prosecutors' mass investigations violated the Food Stamp Act of 1977, 7 U.S.C. (Supp. III) 2011 *et seq.*, federal regulations issued pursuant to the Act, and Florida's agreement with the Department of Agriculture (Pet. App. 2-9).[1]

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[1]Respondents also presented constitutional claims, but the court of appeals found it unnecessary to reach them (Pet. App. 38-39).

The district court denied respondents' motion for a preliminary injunction to prevent further disclosures *pendente lite* (Pet. App. 56-72). On appeal, the court of appeals reversed and remanded the case to the district court with instructions to issue a preliminary injunction "enjoining [the Florida Department of Health and Rehabilitative Services] from releasing food stamp files to the state attorney absent any basis to suspect that the affected households have committed fraud" (*id.* at 40). The court of appeals held that, in the absence of some reason for suspecting fraud, general disclosure of food stamp recipient files to state prosecutors and police is inconsistent with both the regulations of the Secretary of Agriculture and the Food Stamp Act (*id.* at 17-40).

DISCUSSION

The decision of the court of appeals represents a reasonable construction of the Food Stamp Act and the Secretary's regulations and does not conflict with that of any other court of appeals. Furthermore, the policy choices implicit in the existing balance between (1) the need for effective means of preventing and detecting fraud in the Food Stamp Program and (2) the need to protect food stamp recipients from unnecessary and intrusive investigations are currently under review in both Congress and the Department of Agriculture. Consequently, the decision below may be of little future significance. Review in this Court is therefore unwarranted.

1. Neither the Food Stamp Act nor the Secretary's regulations expressly prohibit the sort of investigation undertaken by the state prosecutors in this case. Nevertheless, both the statute and the regulations support the decision of the court of appeals (see Pet. App. 19-26, 32-36). Congress' concern for protecting the privacy of food stamp recipients and the confidentiality of the information submitted by applicants and recipients is manifest. Section 11(e)(3) of the

Act (7 U.S.C. (Supp. III) 2020(e)(3), as amended by the Food Stamp Act Amendments of 1980, Pub. L. No. 96-249, Section 116, 94 Stat. 361-362), carefully limits the extent to which a state food stamp agency may seek verification of the information provided by applicants.[2] The state agency may seek verification *only* of the applicant's income, the size of his household, "such other eligibility factors as the Secretary determines to be necessary" (7 U.S.C. (Supp. III) 2020(e)(3)),[3] and such other "factors of eligibility involving households that fall within the State agency's error-prone household profiles * * * and * * * approved by the Secretary" (Pub. L. No. 96-249, Section 116, 94 Stat. 362).[4]

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[2]"Verification is the use of third-party information or documentation to establish the accuracy of statements on the application." 7 C.F.R. 273.2(f).

[3]The Secretary's regulations specify items that must be verified (see 7 C.F.R. 273.2(f)(1), as amended, 46 Fed. Reg. 3194, 3199 (1981)) and those for which verification may be sought if "the information on the application [is] inconsistent with statements made by the applicant, inconsistent with other information on the application or previous applications, or inconsistent with information received by the State agency" (7 C.F.R. 273.2(f)(2), as amended, 46 Fed. Reg. 3194, 3199 (1981)). Documentary evidence is specified as the "primary source of verification" (7 C.F.R. 273.2(f)(4)(i), as amended, 46 Fed. Reg. 3194, 3201 (1981)); visits to the applicant's home and communications with individuals outside the applicant's household are strictly limited (see 7 C.F.R. 273.2(f)(4)(ii), (iii), and 7 C.F.R. 273.2(f)(5)(ii), as amended, 46 Fed. Reg. 3194, 3201 (1981)).

[4]"To be approved, the [error-prone] profile must: either meet the standard computer package developed by [the Food and Nutrition Service] or an alternate method approved by FNS; identify error concentrations with both statistical and practical significance; provide classification of errors within error-prone household categories; provide sufficient information to establish priorities in addressing corrective action to household categories prone to more than one type of error (primary factors in setting priorities should include such factors as the probability of error, the dollar losses, the number of households involved, and the geographic extent of the error); identify error concentrations with significant dollar losses; *and* meet other standards that FNS may prescribe." 46 Fed. Reg. 3200-3201 (1981) (emphasis added). See generally H.R. Rep. No. 96-788, 96th Cong., 2d Sess. 96-98 (1980).

Moreover, state agencies are expressly required to adopt "safeguards" that "limit the use or disclosure of information obtained from applicant households to persons directly connected with the administration or enforcement" of the Act or the Secretary's regulations. 7 U.S.C. (Supp. III) 2020(e)(8); see 7 C.F.R. 272.1(c).

Congress' attempt—suggested by the limited verification provisions described above—to reconcile the need to prevent fraud (and, of course, ordinary error) with the substantial privacy interests of food stamp recipients is also evident in the detailed fraud and error prevention mechanisms established in the Act. For example, in authorizing the Commissioner of Social Security to disclose wage and earnings information to state food stamp agency employees "upon written request" (Pub. L. No. 96-249, Section 127, 94 Stat. 365-367), Congress expressly provided that the information was to be disclosed only for "purposes of, and to the extent necessary in, determining an individual's eligibility for benefits" under the Food Stamp Program and required the states to establish safeguards for ensuring that it was used only for that purpose. See also Pub. L. No. 96-249, Section 117, 94 Stat. 362 (photographic identification); 46 Fed. Reg. 7748 (1981) (proposed rules concerning photographic identification requirements); H.R. Rep. No. 96-788, 96th Cong., 2d Sess. 98-101 (1980); 7 U.S.C. (Supp. III) 2015(b) (disqualification hearings); note 3, *supra*. Congress has recognized that "[t]he program need for certain information is great, but [that need] must be carefully balanced by the need to protect needy individuals from having their privacy bartered away in order to assuage their hunger." H.R. Rep. No. 96-788, *supra*, at 106.[5]

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[5]Congress has also recognized the need to encourage state agencies to develop procedures to reduce their error rates, including both the denial of benefits to eligible individuals and the granting of benefits to ineligible individuals. See 7 U.S.C. (Supp. III) 2025(c), as amended, Pub. L.

In light of the care with which Congress has attempted to maintain this balance, it seems apparent that the sort of investigation conducted in Florida is inconsistent with the Act and the Secretary's regulations. If petitioners' view of the statutory scheme were correct, the carefully drawn limitations on verification would be rendered largely meaningless, as would the limitations on disclosure of wage and earnings information obtained from the Social Security Administration. While the state agency would be bound by these restrictions, the police and the prosecutors could ignore them. Furthermore, while the Secretary's regulations encourage the state agencies "to refer for prosecution under State or local fraud statutes *those individuals suspected of committing fraud*, particularly if large amounts of food stamps are suspected of being fraudulently obtained or the individual is suspected of committing more than one fraudulent act" (7 C.F.R. 273.16(e)(2) (emphasis added)), under petitioners' view the state agency may turn over the files of all recipients simply because they have been requested, whether or not any of the recipients are suspected of wrongdoing. Although the statute and regulations do not expressly govern investigations by state prosecutors, the investigations at issue in this case far exceed the limited verification procedures prescribed. Absent statutory or regulatory amendment, such investigations should not be permitted.[6]

No. 96-249, Section 126, 94 Stat. 364-365. Such procedures will almost certainly lead to the discovery of more attempts to defraud and, presumably, referrals for prosecution or administrative proceedings under 7 U.S.C. (Supp. III) 2015(b). See also 46 Fed. Reg. 4642, 4657 (1981).

[6]For purposes of this brief we assume (as the court of appeals apparently did) that petitioner Austin and the other prosecutors are "directly connected with the administration or enforcement of the provisions" of the Food Stamp Act or the Secretary's regulations (see 7 U.S.C. (Supp. III) 2020(e)(8)).

The thrust of petitioners' argument is that their goal is the "ferreting out [of] food stamp cheats" (Pet. 17) and that this goal is fully consistent with the statute (see Pet. 16-18, 23, 27-28, 31-32). While the federal government certainly concurs in the desirability of eliminating fraud in the Food Stamp Program, we submit that a much more selective approach to the problem is more consistent with the structure and purposes of the Act. See 7 C.F.R. 273.16(e)(2).

2. The Food Stamp Act Amendments of 1980, Pub. L. No. 96-249, 94 Stat. 357 *et seq.*, made substantial changes in the procedures for preventing and detecting fraud. To the extent that petitioners urge that the sort of investigation conducted in this case is essential to the reduction of the asserted 40% fraud rate in Florida, these changes may have eliminated the basis for that argument.[7] More recently, the Senate adopted an amendment to Section 11(e)(8) of the Act, 7 U.S.C. (Supp. III) 2020(e)(8), providing that:

> notwithstanding any other provision of law, all information obtained under this Act from an applicant household shall be made available, upon request, to local, State, or Federal law enforcement officials for the purpose of investigating *a possible or alleged violation of this Act* or any regulation issued under this Act.

S. 1007, 97th Cong., 1st Sess. § 313 (1981) (emphasis added); see S. Rep. No. 97-128, 97th Cong., 1st Sess. 148, 65-66 (1981). The Senate Committee on Agriculture, Nutrition, and Forestry expressed its intention to make clear that law enforcement officials should have access to information provided by applicants "so long as they are conducting investigations to determine possible violations related to the Food Stamp Act" (S. Rep. No. 97-128, *supra*, at 65). If

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[7]Although the amendments were adopted about six months before the court of appeals' decision, they had not been fully implemented at the time of the decision.

this provision is ultimately enacted,[8] the decision of the court of appeals will be moot. See, *e.g., United States* v. *Alaska Steamship Co.*, 253 U.S. 113, 116 (1920). In any event, the 1980 legislation, the implementing regulations, and the current rule-making proceedings (see page 5, *supra*), make review of the decision of the court of appeals unnecessary.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1981

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[8]No action on the bill has yet been taken in the House of Representatives.